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No. 90-1141

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

RAFEH-RAFIE ARDESTANI, Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

DAVID N. SOLOWAY
Counsel of Record
CAROLYN F. SOLOWAY
Counsel for Petitioner

FRAZIER, SOLOWAY & POORAK
1800 Century Place, Suite 100
Atlanta, Georgia 30345
(404) 320-7000

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ARGUMENT

I. THE EAJA'S WAIVER OF SOVEREIGN IMMUNITY DOES NOT COMPEL AN INTERPRETATION THAT OVERRIDES THE STATUTE'S PURPOSES.

A. WAIVERS OF SOVEREIGN IMMUNITY MUST BE CONSTRUED IN CONTEXT WITH CONGRESSIONAL INTENT.

The principal argument advanced by Respondent Immigration and Naturalization Service ("INS") is that the plain language of the EAJA, narrowly construed as a waiver of sovereign immunity, indicates a Congressional intention to deny recovery of attorney's fees in deportation proceedings before immigration judges where the government has prosecuted without legal justification. (Res. Br. 7-13). For the reasons discussed in Petitioner's opening Brief, the plain language of the EAJA, applying to "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing" (8 U.S.C. § 1252(b); 8 C.F.R. §§ 242.15-242.16), is met in deportation hearings; alternatively, the statutory language is subject to more than one interpretation. (*See* Pet. Br. 14-17). For the reasons discussed below, the Court should not invoke the convention of narrow construction, but instead should construe the statute to achieve its purposes.

The principle of construing narrowly waivers of sovereign immunity, does not compel a court to so construe a statute at the expense of defeating the statute's purpose.[1] Rather, the Court

[1]The INS has not identified an underlying policy furthered by the general rule of statutory construction it urges. Any suggestion that such a policy might be one of freeing the government from the burden of lawsuits would be inconsistent with and would undermine EAJA's fundamental goals of encouraging litigation to assure efficient and fair government conduct. *See* Thomas W. Holm, *Aliens' Alienation From Justice: The Equal Access to Justice Act Should Apply to Deportation Proceedings*, 75 Minn.L.Rev. 533-534 (1991).

should construe the statute "in light of its purpose 'to diminish the deterrent effect of seeking review of, or defending against, [unjustified] governmental action....'" *Sullivan v. Hudson*, 490 U.S. 877, 890 (1989). "[I]ntent to waive [sovereign] immunity and the scope of such a waiver can only be ascertained by reference to underlying Congressional policy." *Franchise Tax Board v. United States Postal Service*, 467 U.S. 512, 521 (1984). Courts "must be careful not to assume the authority to narrow the waiver that Congress intended, or construe the waiver unduly restrictively." *Irwin v. Veterans Administration*, ___ U.S. ___, 111 S.Ct. 453, 457, ___ L.Ed.2d ___ (1990), *citing*, *Bowen v. City of New York*, 476 U.S. 467, 479 (1986).

Modern jurisprudence contains numerous examples of properly refusing the government's request to invoke a narrow construction guide. In *Irwin*, this Court held that while a waiver of sovereign immunity "must be unequivocally expressed," and not simply implied, once Congress has made such a waiver, "a realistic assessment of legislative intent as well as a practically useful principal of interpretation," authorizes statutory construction beyond the narrowest plausible reading. *Id.* at 457.

In *Irwin*, an employment discrimination lawsuit was filed against the Veterans Administration, beyond the time statutorily allowed. The government agency urged that this filing deadline be construed strictly as a jurisdictional limit. This Court refused to be bound by a wooden guideline for statutory interpretation. This Court held that even if the statute had contained mandatory language (such as "every claim shall be barred unless the petition is filed within" a specified time), the Court would broadly construe the deadline to allow "equitable tolling" and other equitable defenses such as waiver and estoppel. *Id.* 111 S.Ct. 456-457.[2]

In *Franchise Tax Board*, this Court interpreted broadly "sue and be sued" and "settle and compromise claims" as applied to the

[2]Thus, the INS severely misconstrues *Irwin* in stating that the case merely stands for the proposition that a broad interpretation of a waiver of sovereign immunity may be made only when the effect is *de minimis*. (Res. Br. 8, n. 6).

government. Although that language could mean merely litigating in court and settling such court actions, the Court broadly construed the waiver of sovereign immunity to allow the government to be subjected to garnishment-like actions (rather than a complaint in a lawsuit) issued by an administrative agency (rather than by a court). 467 U.S. at 518, 521. The court held that:

> [the government's] crabbed construction of the statute overlooks our admonition that waiver of sovereign immunity is accomplished not by 'a ritualistic formula'; rather intent to waive immunity and the scope of such a waiver can only be ascertained by reference to underlying congressional policy.

Id. at 521.

The Court's analysis included a comparison of (a) court lawsuits and garnishment judgments, and (b) tax board orders to withhold. 467 U.S. at 522-523. The Court determined that there was "no meaningful difference" between the two (*id.* at 522) and that "in operation and effect" they were the same (*id.* at 523). Here, this type of analysis is appropriate both to the sovereign immunity inquiry and to the relevant statutory interpretation. As *Irwin* instructs, once Congress clearly has waived the government's immunity to fees, *see* 5 U.S.C. § 504, the statute should be construed like any other, with reference to Congressional intent. Moreover, as *Franchise Tax Board* teaches, there is no "meaningful difference" between an administrative adjudication "subject to" the APA and deportation proceedings, which are, in all practical respects, procedurally identical to APA adjudications.

B. THE DOCTRINE OF BROADLY INTERPRETING REMEDIAL STATUTES TO EFFECTUATE THEIR PURPOSES SUPPORTS THE APPLICABILITY OF EAJA TO DEPORTATION HEARINGS BEFORE IMMIGRATION JUDGES.

As a remedial statute, EAJA is entitled to an interpretation enabling its objectives to be accomplished. *Gomez v. Toledo*, 446

U.S. 635, 639 (1980); *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 12-13 (1980); 3 J. Sutherland, *Statutes and Statutory Construction* § 62.01, at 55 (C. Sands 4th ed. 1972). As this Court has held, EAJA requires an endeavor to interpret the fee statute "in light of its purpose 'to diminish the deterrent effect of seeking review of, or defending against, [unjustified] governmental action....'" *Sullivan v. Hudson, supra* at 883-884; *see also Commissioner v. Jean*, ___ U.S. ___, 110 S.C. 2316, 2320-2323, ___ L.Ed.2d ___ (1990).[3]

II. THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES ("ACUS"), STATUTORILY DESIGNATED AS AN AUTHORITY CONCERNING EAJA IMPLEMENTATION, DID NOT GIVE ITS STAMP OF APPROVAL TO THE POSITION ADVOCATED BY INS, BUT INSTEAD URGED A BROAD INTERPRETATION OF THE STATUTORY LANGUAGE.

The EAJA recognizes the ACUS as an authority for its proper interpretation, and explicitly directs agencies to consult with the Chairman of the ACUS regarding implementation of the EAJA. 5 U.S.C. § 504(c)(1). The Chairman advised agencies to adopt a broad interpretation of "adjudications under Section 554" and to avoid technical disputes about whether a particular proceeding fell within the statute's coverage. *Office of the Chairman of the Administrative Conference of the United States Equal Access to Justice Act: Agency Implementation*, 46 Fed. Reg. 32,901.

The INS misconstrues the nature of ACUS's response to comments. (Res. Br. 21). ACUS responded to comments by revising its initial interpretation: that EAJA was applicable in instances where hearings were not required by statute (but merely were "provided at the discretion of the government"), and in instances where agencies are not required by statute to use procedures "*described in* section 554" (emphasis added). 46 Fed.

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[3]In its brief, the INS has ignored the doctrine of broadly construing a remedial statute to enable its objectives to be accomplished.

Reg. 32,901.[4] Indeed, in the same document cited by the INS, ACUS demonstrated that it did not retract its interpretation of Congressional intention that "questions of EAJA's coverage should turn on substance - the fact that the party has endured the burden and expense of a formal hearing - rather than technicalities." *Id.*[5] As explained in detail in Petitioner's opening Brief (Pet. Br. 18-19), the ACUS thus believed that the EAJA is applicable whenever an adjudication employs procedures similar to those defined in 5 U.S.C. § 554. That view is entitled to deference.

III. CONGRESS' EXPRESS APPLICATION OF EAJA TO CERTAIN SOCIAL SECURITY PROCEEDINGS DEMONSTRATES THAT TECHNICAL GOVERNANCE BY THE APA IS NOT NECESSARY.

Congress contemplated that EAJA would apply to certain Social Security cases regardless of whether they technically were "governed by" the APA, so long as they functionally met the definition of adversary adjudications. *See*, H.R. Rep. No. 120, 99th Cong. 1st Sess, *reprinted in* 1985 U.S. Code Cong. & Ad. News 138 ("While, generally, Social Security administrative hearings remain outside the scope of [section 504], those in which the Secretary [of Health and Human Services] is represented are covered by the Act.") *See also*, H.R.Conf.Rep. No. 1434, 96th Cong. 2d Sess, at 23, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5012 ("[the definition of adversary adjudication] precludes an award in a situation where an agency, e.g., the Social Security Administration, does not take a position in the adjudication.... If, however[,] the agency does take a position at some point in the adjudication, the adjudication would then become adversarial."). Congress was not

[4]By addressing procedures "*described in* section 554," ACUS demonstrated its interpretation that EAJA applies to proceedings "described in" or "defined in" section 554, rather than just to those "governed by the APA." 46 Fed. Reg. 32,901.

[5]The Department of Justice itself noted that the ACUS was critical of its departures from the ACUS model rules. 47 Fed. Reg. 15,774 (1982).

concerned that *Richardson v. Perales*, 402 U.S. 389 (1971), expressly had declined to settle the controversy about whether Social Security proceedings were governed by the APA or by a more specialized version of the APA such as the Social Security Act (or the INA); Congress was concerned only that the hearings are of the type defined in section 554. *Escobar Ruiz v. INS*, 838 F.2d 1020, 1027 (9th Cir. 1988) (*en banc*). The suggestion by INS that Congress even considered, let alone resolved, the long-standing arcane legal controversy about whether Social Security hearings are governed by the APA, is improbable. (Res. Br. 25 n. 23).

IV. PETITIONER'S TEST IS COMPATIBLE WITH THE EAJA'S GENERAL PURPOSES, PROVIDES A MEANINGFUL "BRIGHT-LINE RULE," AND SETS APPROPRIATE LIMITS.

The INS has suggested that looking to the statute's purposes and goals to glean the proper construction of EAJA's "under Section 554" language might require EAJA to apply "in almost any administrative action in which government action is successfully challenged." (Res. Br. at 27). INS also has asserted that curtailing costs and adopting a "bright-line rule" for applicability are the statutory purposes served by the interpretation it now urges.

EAJA awards are not authorized merely when government action is successfully challenged: they may be awarded only when the government's position in an adversary adjudication was not substantially justified. 5 U.S.C. § 504(a)(1). The statute further limits its applicability to those cases where the position of the government is represented by counsel or otherwise (5 U.S.C. § 504(b)(1)(C)).[6]

In *Commissioner v. Jean, supra*, this Court held "[t]he Government's general interest in protecting the federal fisc is

[6]Moreover, an EAJA applicant must meet certain financial limitations. 5 U.S.C. § 504(b)(1)(B), and an award may be reduced or denied in cases where an applicant has unreasonably protracted the proceedings. 5 U.S.C. § 504(a)(3).

subordinate to the [EAJA's] specific statutory goals of encouraging private parties to vindicate their rights and 'curbing excessive regulation and the unreasonable exercise of Government authority.'" *Id.* at 2322, *citing* H.Rep. No. 96-1418, p. 12 (1980). The monetary cost to the government for EAJA awards is discussed in the Brief of *Amicus Curiae* American Bar Association at page 17-18, n. 12, and A5. *See also Commissioner v. Jean, supra* at 2322 n. 12, 13. The enormous difference between the sums budgeted by Congress for implementation of EAJA (originally $100 million per year) and the actual expense experienced or later forecast ($1.3 million to $7 million per year), *see* H. Rep. No. 120, 99th Cong., 1st Sess. at 3, 8-9 (1985) itself indicates that a broader implementation of EAJA was intended than has been effectuated.

The "bright-line" promised by INS is an illusion (Res. Br. 28). The suggestion that EAJA's purposes are furthered by adopting the "governed by/subject to Section 554" interpretation because it makes determination of applicability simple, is undermined by the difficulty litigants and courts have had in determining whether the Administrative Procedure Act governs a particular agency adjudication. Exemptions from the APA are determined by an analysis of the statutory language; there must be an express negation of an APA provision in order for a provision of another statute to supersede it. 5 U.S.C. § 1011 (1952). This, of course, leads to case-by-case analyses, and can prove extraordinarily difficult. *Compare, Marcello*, 349 U.S. 302, 308-310 *with id.* at 315-318 (Black, J., dissenting).[7]

[7]For example, in *Van Teslaar v. Bender*, 365 F. Supp. 1007 (D. Md., 1973), the court completed a functional analysis of a Coast Guard administrative proceeding, and concluded that since the proceeding was "required by statute to be determined on the record after opportunity for an agency hearing," the Administrative Procedure Act therefore must apply. *Id.* at 1011. *See also, Blackwell College of Business v. Attorney General*, 454 F.2d 928 (D.C. Cir., 1971) [holding that the INS is an "agency" within the terms of the Administrative Procedure Act, and is therefore subject to APA requirements. *Id.* at 933] *See also, Richardson v. Perales, supra.*

A practicable "bright-line" is achievable, however, by adoption of the functional analysis of the "as defined in Section 554" interpretation. If a proceeding satisfies the requirements of Section 554: (1) a statute mandating an agency to have a hearing on the record, and (2) the government is represented by counsel, then EAJA may apply. This is a "bright-line" because the statute on its face would specify: whether a hearing or proceeding is required [as in deportation proceedings (8 U.S.C. § 1252(b) (1988)]; and whether the hearing must be on the record [as in 8 U.S.C. § 1252(b)]. The representation of the government by counsel or otherwise may be determined readily by seeing whether the record shows the presence of an advocate for the government's position. *See,* Holm, *supra,* at 536-537.

V. THE INS ITSELF HAS INTERPRETED SECTION 292 NOT TO BE A GENERAL BAR TO GOVERNMENT-PAID REPRESENTATION FOR ALIENS

Petitioner's Opening Brief addressed the appropriate function of Section 292 of the INA (8 U.S.C. § 1362), and its compatibility with a functional and goal-fulfilling interpretation of the EAJA (Pet. Br. 28-30). In its brief, the INS erroneously has described the parenthetical language in Section 292 as an "absolute bar" to government-paid representation (Res. Br. 30).[8]

The INS itself, however, has rejected such a broad reading of the parenthetical language: its own regulations require immigration judges to advise aliens about the availability of free legal services programs. 8 C.F.R. § 242.16(a) (1990). At the time the regulations originally were issued, the INS noted that many legal services organizations are funded with government money, and stated that it found "no conflict between the limitation in section 292 of the Act and the availability of free legal services rendered by those organizations which are recipients of funds provided by certain *Federal agencies or the Legal Services*

[8]Accord, *Hashim v. Immigration and Naturalization*, ___ F.2d ___, No. 90-4125 (2d Cir. June 25, 1991).

Corporation." (emphasis added) 44 Fed. Reg. 4652 (1979). *See also* Holm, *supra* at 523 n. 141.

CONCLUSION

For the reasons stated above, and in the Petitioner's opening Brief, the judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

David N. Soloway
Counsel of Record
Carolyn Frazier Soloway
Counsel for Petitioner

Frazier, Soloway & Poorak
1800 Century Place
Suite 100
Atlanta, Georgia 30345
404/320-7000

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